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Before The
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	
)	
LRB BROADCASTING)	File No. BPH-901218MI
)	
DAVID L. WOLFE)	File No. BPH-901219MI
)	
ZENITRAM COMMUNICATIONS, INC.)	File No. BPH-901220MG
)	
For a Construction Permit For a)	MM Docket No. 92-61
New FM Station on Channel 288A)	
in Brockport, New York)	

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FILE

To: The Review Board

JOINT OPPOSITION TO APPEAL

David Wolfe ("Wolfe") and LRB Broadcasting ("LRB"), by their attorneys, hereby oppose the Appeal filed by Zenitram Communications, Inc. ("Zenitram") on June 29, 1992 in which the Board is asked to reverse the action of the Presiding Judge dismissing the Zenitram application for failure to prosecute. In support thereof, it is shown as follows:

1. In his Memorandum Opinion and Order, the Presiding Judge points out that the Hearing Designation Order (HDO) released April 13, 1992, which is served on all parties and their counsel, notifies parties that they must file a Notice of Appearance within 20 days of the mailing of the HDO and that a standard Document Production and a Standard Integration Statement must be exchanged five days thereafter. The Presiding Judge also noted that the HDO stated that:

"Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application"

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2. Four days after the release of the HDO, the Presiding Judge's Prehearing Conference Order was released which again referred to the need for a Notice of Appearance, and the Standard Document Production, and the Standard Integration Statement. The Presiding Judge reminded the parties that:

"... failures to comply with procedural and discovery orders of the Presiding Trial Judge may result in dismissal".

3. In his Memorandum Opinion and Order released June 12, 1992, dismissing the Zenitram application, the Presiding Judge states that:

"Zenitram has failed to file a Notice of Appearance and to exchange required documents on time and has not offered a credible excuse".

4. The Presiding Judge rejected Zenitram's argument that the late filing of the Notice of Appearance should be excused simply because of a claim that the Notice along with other material had been placed in the hands of a courier service which did not make the timely filing, and, which "inexplicably" held the package for two weeks at the airport without notifying counsel. The Judge notes that no affidavit from the "allegedly delinquent courier" nor any copy of any invoice, receipt, or bill of lading has been provided. In fact, the courier service has never been identified. The Judge also points out that although Zenitram claims that he and the parties had been timely served, without stating the date of the service, he notes that he had not received a copy by May 4, 1992. The Judge also found it noteworthy (para. 8) that in its opposition to the dismissal motion, Zenitram makes no mention of the fact that it also failed to meet the document production deadline. Further, it should be noted in connection with the late filing of the Integration Statement which was dismissed by separate order, Zenitram contends that the

package was given to the post office on the evening of May 11th but that the post office placed the wrong date on the envelope when the filing was postmarked. However, the Presiding Judge stated that the claim is suspect because on the envelope there was a dated postage meter stamp showing May 12, and, in addition a post office postmark indicating that the envelope was postmarked May 12 "PM". See Attachment A. The Zenitram explanation on the postmark issue has all of the earmarks of a complete fabrication.

5. The Zenitram Appeal¹ states that the Judge cites two reasons for dismissing its application and that one of those reasons is that he found that "it could not be established that Zenitram had paid its hearing fee". Zenitram is incorrect. Although the Judge notes that Zenitram had failed to prove its payment of the fee, he does not base the dismissal on non-payment of hearing fee. He states (para. 9) that "[i]n any event, the new procedures require an NOA after the case is set for hearing and Zenitram was required to follow the rules. It was particularly important to file timely the post-designation NOA because it started the time for exchange of documents and the SIS." The fee non-payment argument is ungrounded. The long discussion of the fee non-payment argument is an attempt to direct attention away from Zenitram's compounded filing failures.

6. Zenitram states that dismissal is inordinately harsh, claiming that neither the hearing process nor any parties were prejudiced. It makes the extraordinary statement that it "could not have foreseen a series of bizarre coincidences, or the sudden incapability

¹ Under Section 1.301 (a)(1) of the Rules, Zenitram could file an appeal as a matter of right by June 19, 1992. Instead, Zenitram filed a Motion for Extension of Time to File Appeal which was filed three days after the filing deadline had expired. The Board granted a five day "extension".

of its attorney to effectively prosecute its application (whichever the case may be)". It does not identify what it means by "bizarre coincidences", and does not provide an affidavit from a Zenitram principal.

7. Zenitram is really asking for a waiver of Section 1.221 (c) of the Rules and the procedural and discovery timetable in the HDO, but has failed to support its request with any justification supported by affidavits. The fact that the Zenitram Notice of Appearance was filed 14 days late, and the integration statement was filed one day late, and the document production 22 days late, cannot be explained away by the reference to "bizarre circumstances" or "sudden incapability" of counsel. The fact is that the HDO gave Zenitram notice of the filing deadlines, and the Zenitram filings were made in an untimely, haphazard manner. Further, Zenitram has failed to offer any support for its excuses other than its own self-serving statements.

8. Zenitram cites Nancy Naleszkiewicz, 7 FCC Rcd. 1797 (1992) for the proposition that a 45 day late filing of a Notice of Appearance was exonerated under worse circumstances. The case involved a single applicant for a permit to establish a new cellular system. The applicant had provided reasons for the late filing which had been accepted by the ALJ. Later, the ALJ found that the proffered reasons had been false and that the late filed notice should not have been accepted. He dismissed the application rather than merely add a hearing issue. The Commission found that there was no basis for the peremptory findings of misrepresentation and that the late filing of the Notice of Appearance and tardiness in answering a single interrogatory were insufficient to warrant

dismissal.² The derelictions in the instant case are far more substantial. The Commission stated (para. 22) that:

"The pertinent guidelines are not to be found in O'Connor, but instead in precedents concerning waiver of the deadline for filing notices of appearance, which is specified by 47 U.S.C. 1.221(c), and concerning dismissal for failure to prosecute... In this regard we note that the considerations that militate for strict enforcement of the deadline in comparative cases, where applicants might otherwise flout it for strategic purposes, See Silver Springs Communications, 3 FCC Rcd 3049 (Rev. Bd. 1988), rev. den. 4 FCC Rcd 4917 (1989) are not present in this single-applicant proceeding."

9. In CSJ Investments, Inc., 68 RR 2d 897 (1990) the full Commission sustained the dismissal of an FM applicant which failed to file its hearing fee and a notice of appearance. The Commission stated (68 RR 2d at 899):

"Key West next contends that the ALJ's dismissal of its application is inconsistent with the Commission's policy of permitting as many qualified applicants as possible to compete in comparative licensing proceedings, thereby ensuring that the best qualified applicant is selected. The Commission, however, now gives greater emphasis to the discretion accorded ALJ's in determining appropriate procedures to facilitate the prompt performance of their responsibilities and applicants have a high burden to justify an exception to the procedural deadlines uniformly applied by the ALJ to all applicants in the proceeding.

....

Given the above, we believe the ALJ had no choice but to dismiss the application in view of Key West's failure

². Additionally, the facts in Maricopa County Community College District, 4 FCC Rcd 7754 (Rev. Bd. 1989) involved a situation lacking a pattern of dilatory conduct. There was such a pattern here.

to pay the hearing fee on January 19, as it promised; indeed, to have held otherwise would have been clear abuse of discretion. A similar result was likewise required in light of Key West's failure to file its notice of appearance on January 19. In this regard, 47 CFR sec. 1.221(c) provides that applications will be dismissed for failure to prosecute when applicants fail to file timely their written notices of appearance. Silver Springs Communications, 3 FCC Rcd 5049 [65 RR 2d 426] (Rev Bd 1988), rev. den, 4 FCC Rcd 4917 (1989)" (emphasis supplied).

10. In Juan Galiano, 5 FCC Rcd 2446; 67 RR 2d 1018 (Rev. Bd. 1990), aff'd. 68 RR 2d 840 (1990), a notice of appearance and hearing fee were filed 10 days late. The applicant, who was not at that time represented by counsel, at first claimed that the late filing was due to late receipt of the HDO which was delayed because a hurricane had caused closing of the post office. The ALJ dismissed the application finding that the hurricane delay claim had been rebutted and, since it was the sole basis for a "good cause" showing, regularity in mail delivery had to be presumed. The Board affirmed the ALJ's dismissal, finding that the applicant had been unable to rebut showings that the storm had not caused any disruption of mail service, and therefore had not demonstrated any "good cause" for the late filing. In the instant case, the applicant has also provided no "good cause" showing. No affidavits from any principal, or from the courier that allegedly delayed the Notice of Appearance, were submitted to support a good cause showing. Further, the delay in document production is not even discussed. The *unsupported allegations of "bizarre circumstances" and "sudden incapability of counsel"* are similar to the hurricane argument in Juan Galiano and are insufficient to establish "good cause" for the substantial Zenitram filing derelictions.

11. The number of Zenitram late filings is substantial and is far beyond the filing failures in the cited cases. It is clear that there has been a pattern of dilatory conduct:

- a) The Notice of Appearance was due on May 4, 1992. Zenitram did not file its notice until May 18, 1992, 14 days late, allegedly due to courier error.
- b) The Standard Document Production by all parties was due on May 11, 1992. Zenitram did not exchange documents until June 2, 1992, 22 days late. No explanation was offered.
- c) The Standard Integration Statement by all parties was due on May 11, 1992. Zenitram did not file until May 12, 1992, allegedly due to a post office mistake.

In view of the foregoing it is submitted that the Presiding Judge had no choice but to dismiss the application. Wolfe and LRB respectfully request that the Appeal filed by Zenitram be denied.

Respectfully submitted,

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July 8, 1992

ATTACHMENT A



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CERTIFICATE OF SERVICE

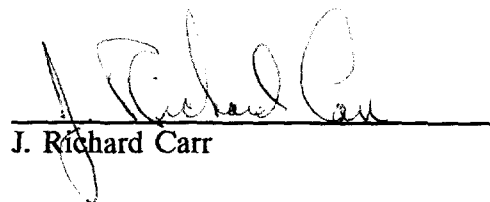
I, J. Richard Carr, hereby certify that copies of the foregoing Joint Opposition to Appeal were sent via first class mail, postage prepaid, or as otherwise indicated, to each of the following on this 8th Day of July, 1992:

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* By Hand Delivery